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SENATE

REPORT
No. 98–215

FEDERAL TRADE COMMISSION ACT AMENDMENTS OF 1983

SEPTEMBER 1, 1983.—Ordered to be printed
Filed under authority of the Senate of AUGUST 4 (legislative day, AUGUST 1), 1983

Mr. PACKWOOD, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 1714]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1714) to amend the Federal Trade Commission Act to provide authorization of appropriations, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill do pass.

PURPOSE OF BILL

The purpose of the legislation is to amend the Federal Trade Commission Act to change the investigative, adjudicative, and rulemaking authority of the Federal Trade Commission (FTC), and to extend authorization of appropriations for the agency. The legislation would authorize to be appropriated $69,900,000 in fiscal year 1984, $71,100,000 for fiscal year 1985, and $72,400,000 for fiscal year 1986.

BACKGROUND AND NEEDS

Under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), the Commission seeks to prevent anti-competitive conduct through its authority over "unfair methods of competition," and protect consumers through its "unfair or deceptive acts or practices" authority. The Commission may enforce this mandate through case-by-case adjudications under section 5 of the FTC Act (15 U.S.C. 45) and through industry-wide rulemaking.

In the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975 (Public Law 93–637), Congress added a new

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section 18 to the FTC Act (1 U.S.C. 57a), providing the agency explicit authority and detailed new procedures for promulgating trade rules to prohibit "unfair or deceptive" practices.

Largely as a result of dissatisfaction with the Commission's exercise of its section 18 consumer protection rulemaking authority, Congress re-directed some of the agency's rulemakings and added additional rulemaking procedures in the FTC Improvements Act of 1980 (Public Law 96–252). The process of evaluating the Commission's exercise of its consumer protection authority has continued in the development of S. 1714, the Federal Trade Commission Act Amendments of 1983.

UNFAIRNESS STANDARD

In particular, evaluation and study of the Commission's authority to prohibit "unfair . . . acts or practices" has continued since 1980. Enacted as part of the Wheeler-Lea Amendment in 1938, the Commission's consumer "unfairness" authority was not a focus of enforcement action until 1964, when, as part of its Statement of Basis and Purpose for a proposed cigarette health warning rule, the Commission identified three factors to be considered in applying the prohibition against consumer unfairness: (1) whether the practice injures consumers; (2) whether it violates established public policy; and (3) whether it is unethical or unscrupulous.[1] These three factors were later quoted with apparent approval by the Supreme Court in the 1972 case of *Sperry & Hutchinson.*[2]

In response to concerns that the Commission's unfairness authority was poorly defined by these principles and potentially unbounded, the Consumer Subcommittee requested public comment on the scope of the Commission's unfairness authority,[3] and wrote to the Commission to request more specific views.

In its December 17, 1980 letter in response, the Commission abandoned one portion of its 1964 unfairness criteria and, summarizing its past use of unfairness in decided cases and rules, articulated guiding principles for future application of its unfairness mandate. Under the Commission's policy statement, unjustified consumer injury is the primary focus of the FTC Act, and the most important of the 1964 criteria. Not every consumer injury is legally "unfair," however; to justify a finding of unfairness, the injury must satisfy three tests:

> It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice procedures; and it must be an injury that consumers themselves could not reasonably have avoided.[4]

With regard to the second of the 1964 criteria, the Commission observed that while "established public policy" may sometimes independently support Commission action, it is used most frequently by

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[1] Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964).

[2] *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 223, 244–45 n. 5 (1972).

[3] The public comments received have been printed by the Committee. See Unfairness: Views on Unfair Acts and Practices in Violation of the Federal Trade Commission Act (1980).

[4] See December 17, 1980 letter from Federal Trade Commission to Senators Ford and Danforth at page 5. This letter is printed in the record of the Committee's March 18, 1982 hearing (Serial No. 97–108).

the Commission as a means of providing additional evidence of consumer injury. Such a policy must be "clear and well-established" and:

> Declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from a general sense of rational values. The policy should likewise be one that is widely shared, and not the isolated decision of a single state or a single court.[5]

The Commission explicitly abandoned future use of the third part of the 1964 criteria relating to "unethical and unscrupulous" conduct.

On March 5, 1982, the Commission wrote again to the Committee,[6] reaffirming the policies of its December 17, 1980 policy statement and recommending that its principles be codified as a statutory definition of unfairness. Section 9 of S. 1714 contains such a new definition of unfairness.

COMMERCIAL ADVERTISING

In addition to problems with the scope of the Commission's unfairness authority, the Committee has been concerned with the use of unfairness to regulate commercial advertising. Traditionally, both before and after the Wheeler-Lea Amendment of 1938, the Commission has regulated commercial advertising only to prevent deception. In its staff report on "Television Advertising to Children" (February 1978) however, the Commission contemplated regulation of some children's advertising, not because it deceived children, but because it was "unfair."

Concerned with the potentially unbounded regulation of non-deceptive commercial advertising on the basis of unfairness, Congress addressed this issue in two ways in section 11 of the FTC Improvements Act of 1980. First, the Commission's authority to issue a children's advertising rule based on unfairness was removed. (After conducting an evaluation of the basis for a children's advertising rule on a deception theory, the Commission terminated the children's advertising proceeding in 1981.)

Second, Congress placed a moratorium on the Commission's use of unfairness in new section 18 rulemakings designed to regulate commercial advertising. The moratorium on new rulemakings permitted the Commission to continue to regulate commercial advertising on the basis of deception, and the Commission retained the authority to rely on unfairness in individual cases against advertisers under section 5 of the FTC Act. Because the unfairness standard for the regulation of commercial advertising practices goes beyond the elimination of misleading or deceptive commercial speech, it presents a Constitutional conflict with first amendment protections for free speech. Section 12 of S. 1714, which makes permanent this moratorium on new section 18 rulemakings to regulate advertising based on unfairness, is motivated by the Committee's continued concern with the potential for abuse in this area.

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[5] See December 17, 1980 letter from Federal Trade Commission to Senators Ford and Danforth at page 12.

[6] See March 5, 1982 letter from Federal Trade Commission to Senators Packwood and Kasten. This letter is printed in the record of the Committee's March 18, 1982 hearing (Serial No. 97–108).

RULE 424

Over 2 years ago, the FTC sought comments on the wisdom of modifying or eliminating its Rule 424 which requires that when grocery stores advertise specials they must have on hand sufficient quantities of the advertised product to meet demand.[7] Comments received in response argue that Rule 424 imposes large costs on retail food stores which may well be out of proportion to the benefits conferred on consumers who ultimately must bear the retailers' increased cost of doing business. Indeed, a study conducted for the Commission by Market Facts, Inc. suggests that consumers may be unwilling to pay the enormous costs which the rule may impose. The Committee instructs the FTC expeditiously to conclude its review of Rule 424 and to determine whether Rule 424 should be modified or eliminated. The Committee expects that the FTC will take such action early in fiscal year 1984.

ACTIVITIES CONCERNING PROFESSIONALS

Since the mid-1970's, the Commission has been active in initiating studies, investigations, cases, and rules respecting state-licensed professionals, including doctors, dentists, optometrists, and veterinarians. Much of this Commission activity has focused on traditional antitrust enforcement, such as the Commission's adjudication against the American Medical Association and the American Dental Association for alleged restraints on advertising by their members.[8]

The Commission has also proceeded under its consumer protection authority, however, principally through rulemakings under section 18 of the FTC Act. In 1978, the Commission issued its trade regulation rule on Advertising of Opthalmic Goods and Services ("Eyeglasses I" Rule) (16 C.F.R. Part 456). As promulgated, the Eyeglasses I rule would have effectively negated state and local laws and regulations which banned truthful advertising by ophthalmologists, optometrists and opticians, and also would have required eye doctors to give each patient a copy of his or her eyeglass prescription following an eye exam so that the patient may comparison shop for eyewear.

In 1980 the court of appeals upheld the rule's prescription release requirement, but remanded the remainder of the rule for further consideration.[9]

On December 2, 1980, the Commission issued an advance notice of proposed rulemaking in another rulemaking relating to commercial ophthalmic practice ("Eyeglasses II" Rule). Following its investigation, the staff of the Commission recommended a rule superseding state law preventing optometrists from working for non-optometrists (such as an optician or a department store), locating a practice in a commercial setting (such as a shopping center), maintaining branch offices, and practicing under a trade name. The Commission is evaluating the comments received on this staff proposal and other regulatory options.

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[7] See 16 CFR Part 424 and 45 Fed. Reg. 59634 (Sept. 10, 1980).

[8] See American Medical Association, 94 F.T.C. 701 (1978), aff'd. 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court without opinion. 455 U.S. 676 (1982). The Second Circuit's opinion in this case also settled the issue of the Commission's jurisdiction over private non profit professional associations, where "the association engages in a substantial amount of activity for the pecuniary gain of its members." 638 F.2d at 454 (Mansfield, J., concurring in part and dissenting in part).

[9] *American Optometric Association* v. *FTC*, 627 F.2d 896 (D.C. Cir. 1980).

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The Commission has also investigated similar commercial practice restrictions in the delivery of dental and legal services, although no rulemaking proceedings have been initiated. The Commission has conducted economic studies of the impact on consumers of restrictions on advertising and other restraints on commercial practice, issued advisory opinions and enforcement guides in the antitrust area, studied state-law restrictions on the scope of practice of opticians and dental hygienists, and developed a model state statute governing generic drug substitution by pharmacists.

Believing that the Commission was intruding inappropriately on State prerogatives and professional self-regulation, the American Medical Association and other groups testified in support of controversial legislation to exempt State-regulated professionals entirely from the Commission's jurisdiction.[10] Such an exemption proposal was offered in the Senate on December 17, 1982 as an amendment to legislation to provide appropriation of funds for the Commission. This amendment was defeated by a vote of 59–37.[11] Subsequently, the American Medical Association and the Chairman of the Commission met over a period of time to develop proposed compromise legislation limiting the Commission's authority to invalidate State law. Section 2 of S. 1714 contains this compromise legislation.

Legislative History

S. 1714 was introduced by Senator Packwood on July 29, 1983 following several days of hearings. General hearings on the reauthorization of the FTC were conducted before the full Committee on March 16, 17, and 18, 1983 (Serial No. 98–19) and March 18 and 19, 1982 (Serial No. 97–108). More focused hearings were conducted before the Consumer Subcommittee on July 15 and 17, 1981 regarding the FTC's jurisdiction over State-regulated professional (Serial No. 97–59) and on July 22, 1982 regarding the FTC's authority to ban deceptive advertising (Serial No. 97–134).

Related legislation referred to the Committee during the 97th Congress including S. 1984 (introduced by Senator McClure); S. 2221 (Senator Cannon); and S. 2499 (Senator Kasten). S. 2499 was reported by the Committee on May 28, 1982 (S. Rep. No. 97–451). The 97th Congress adjourned, however, without Senate action on S. 2499.

S. 1714 was ordered reported by the Committee on August 2, 1983, with an amendment in the nature of a substitute.

Summary of Bill

SECTION 1.—SHORT TITLE

The short title of this legislation is the "Federal Trade Commission Act Amendments of 1983."

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[10] See generally hearings before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation on FTC Activities Concerning Professionals, 97th Congress, 1st Session (July 15 and 17, 1981) (Serial No. 97–59).

[11] See debate concerning H.J. Res. 599 in the Congressional Record of December 16, 1982, pages S15069–80. The proposed professionals exemption was defeated in the Senate on an earlier occasion, as well. See Congressional Record of February 6, 1980, pages S1102–7.

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SECTION 2.—PROFESSIONS

This section would add two new provisions to the FTC Act prohibiting the Commission from interfering with certain regulatory functions of the States. First, in a new subsection to section 5 of the FTC Act, the "State action" antitrust immunity developed by the courts in litigation under the Sherman Act would be applied also to the Commission's "unfair methods of competition" cases. Second, in a new section 24, the Commission would be prohibited from using its "unfair or deceptive acts or practices" authority, either through rulemakings or adjudications, to invalidate State laws prescribing training, education, or experience requirements for the licensure of professionals or permissible tasks or duties that professionals may perform based on specialized training or education.

SECTION 3.—AGRICULTURAL COOPERATIVES

This section would add a new section 25 to the FTC Act making permanent the temporary prohibitions of Commission studies, investigations or prosecutions of agricultural cooperatives for conduct falling within the limited antitrust immunity provided by the Capper-Volstead Act. In addition, the Commission would be required to consult with the Secretary of Agriculture regarding the applicability of the Capper-Volstead immunity before suing a cooperative for an antitrust violation.

SECTION 4.—COMPENSATION IN PROCEEDINGS

This section would repeal the Commission's authority under section 18(h) of the FTC Act to compensate public participants in Commission rulemaking proceedings.

SECTION 5.—KNOWING VIOLATIONS OF ORDERS

This section would amend section 5(m)(1)(B) of the FTC Act (which gives the Commission the authority to go to Federal court to seek civil penalties against one company for a knowing violation of an order entered against a different company) to permit the defendant to challenge in court the legal basis for the Commission's prior order, thereby codifying the U.S. District Court decision in *United States* v. *Braswell, Inc.*, 1981–82 Trade Cas. ¶64,325 (N.D. Ga. 1981), *aff'd*, No. 81–9666 (11th Cir., March 3, 1982).

SECTION 6.—PREVALENCE

This section would amend section 18(b) of the FTC Act to provide that the Commission may issue a notice of proposed rulemaking only where it has reason to believe that the challenged conduct is prevalent in the industry.

SECTION 7.—EFFECTIVE DATE OF ORDERS

This section would amend section 5(g) of the FTC Act to end the present requirement for an automatic stay of Commission cease and

desist orders pending appeal, and, with some exceptions, provide instead that Commission orders may be stayed by the Commission itself or by the courts (within their discretion) during the appeal process. This section would conform Commission practice to that of other Federal agencies.

SECTION 8.—CIVIL INVESTIGATIVE DEMANDS

This section would extend the "Civil investigative demand" document procedures contained in section 20 of the FTC Act, which now apply to Commission investigations under its consumer protection authority, to investigations concerning any act or practice or method of competition declared unlawful by a law administered by the Commission. Principally, this amendment would have the effect of requiring that Commission antitrust investigations be conducted pursuant to section 20, just as consumer protection investigations already are.

SECTION 9.—DEFINITION OF UNFAIR ACTS OR PRACTICES

This section would add a new subsection to section 5 of the FTC Act limiting unlawful "unfair acts or practices" to acts or practices that have caused or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition. This definition would circumscribe the Commission's consumer unfairness authority for both rulemakings and case-by-case adjudications.

SECTION 10.—TRADEMARKS

This section would add a new section 26 to the FTC Act making permanent the temporary prohibition of certain Commission actions to cancel the registration of trademarks.

SECTION 11.—CREDIT UNIONS

This section would amend sections 5, 6, and 18 of the FTC Act to exempt Federal credit unions from Commission jurisdiction on the same basis that banks and savings and loans are now exempt. Federal credit unions are regulated by the National Credit Union Administration.

SECTION 12.—COMMERCIAL ADVERTISING

This section would amend section 18 of the FTC Act to make permanent the temporary provision prohibiting the Commission from initiating any new rulemaking proceeding prohibiting or otherwise regulating any commercial advertising on the basis that such advertising is an unfair act or practice.

SECTION 13.—REPORT

This section would require the Commission to report semi-annually to the House and Senate Commerce Committees on Commission enforcement activities in the area of resale price maintenance.

SECTION 14.—AUTHORIZATION OF APPROPRIATIONS

This section would reauthorize the Commission for 3 years at the following funding levels; $69,900,000 for fiscal year 1984; $71,100,000 for fiscal year 1985; and $72,400,000 for 1986.

SECTION 15.—EFFECTIVE DATE

Unless otherwise provided, this legislation will be effective upon enactment.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., August 11, 1983.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 1714, the Federal Trade Commission Act Amendments of 1983.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

AUGUST 11, 1983.

1. Bill number: S. 1714.
2. Bill title: Federal Trade Commission Act Amendments of 1983.
3. Bill status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation, August 2, 1983.
4. Bill purpose: S. 1714 authorizes the appropriation of $69.9 million in fiscal year 1984, $71.1 million in fiscal year 1985, and $72.4 million in fiscal year 1986 to carry out the programs of the Federal Trade Commission (FTC). In addition, the bill makes a number of changes in FTC policies and procedures.

Fiscal year 1983 appropriations to date for the FTC are $63.6 million. The President is requesting $59.5 million for the FTC in 1984.

5. Estimated cost of the Federal Government:

Authorization level: Fiscal year:	*Millions*
1984	$69.9
1985	71.1
1986	72.4
1987	-----
1988	-----

Estimated outlays:

Fiscal year:	*Millions*
1984	63.9
1985	71.0
1986	72.3
1987	6.2
1988	-----

Including outlays from prior years' budget authority, total outlays for the FTC in 1984 would be approximately $69.4 million.

The costs of this bill fall within budget function 370.

Basis of estimate.—For purposes of this estimate, it was assumed that the amount authorized in the bill would be appropriated prior to the beginning of each fiscal year. Outlays reflect historical spending patterns.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: On May 13, 1983, CBO prepared a cost estimate for H.R. 2970, as ordered reported by the House Committee on Rules, May 13, 1983. On the same day, CBO prepared an identical cost estimate for H.R. 2970, as ordered reported by the House Committee on Energy and Commerce, May 12, 1983. Each bill authorized the appropriation of $70.7 million in 1984, $75.7 million in 1985, and $80.9 million in 1986 for the FTC. Estimated outlays were $64.6 million in 1984, $75.2 million in 1985, $80.5 million in 1986, and $7.0 million in 1987.

On May 13, 1983, CBO also prepared a cost estimate for H.R. 2974, which specified a 1984 authorization for the FTC level of $70.7 million. Estimated outlays were $64.6 million in 1984 and $6.1 million in 1985.

9. Estimate prepared by: Mary B. Maginniss.

10. Estimate approved by:

JAMES L. BLUM,
Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

The legislation is expected to reduce the burdens of FTC regulation, principally by limiting the Commission's jurisdiction over certain classes of persons and entities and by circumscribing certain types of authorities. Section 2 and 3 limit Commission authority over State-regulated professionals and agricultural cooperatives. Section 11 of the bill would exclude credit unions from Commission jurisdiction to the same extent that banks and savings and loan institutions are exempt. Any adverse economic impact of Commission regulation is likely to be reduced by clarifications to Commission authority contained in other sections. The legislation contains no new major obligations or authority for the Commission, and it is not likely to affect substantially the privacy of individuals or paperwork requirements.

Section-by-Section Analysis

Section 1.—Short title

This section contains the short title of the legislation, the "Federal Trade Commission Act Amendments of 1983."

Section 2.—Professions

This section contains two new limitations on the Commission's authority to invalidate certain State laws.

First, subsection (a) would amend section 5 of the FTC Act to add a new subsection providing that the Commission shall not have any authority to find a method of competition to be an unfair method of competition if, in any action under the Sherman Act, such method of competition would be held to constitute "State action." Beginning with the Supreme Court's 1943 decision in *Parker* v. *Brown* [12] courts have held conduct to be exempt from antitrust challenge under the Sherman Act if the conduct was required by a State, pursuant to clearly articulated State policy, and actively supervised.[13] The purpose of subsection (a) is to make this judicially developed "State action" immunity applicable to the Commission's "unfair methods of competition" authority, just as the immunity is presently applicable in actions under the Sherman Act. The Committee intends that as courts continue to refine and develop the State action immunity, these refinements and changes apply to future Commission actions as well. Subsection (a) is not intended to limit in any way the Commission's authority over "unfair or deceptive acts or practices."

Second, subsection (b) would add a new section 24 to the FTC Act, containing a specific limitation on the Commission's use of its "unfair or deceptive acts or practices" authority to invalidate certain State laws relating to State-regulated professionals.

Under this new section 24, the Commission would be prohibited from using its authority over "unfair or deceptive acts or practices" to invalidate a State law or any part of a State law that establishes: (1) training, education, or experience requirements for the licensure of professionals, or (2) permissible tasks or duties that professionals may perform "based on specialized training or education". This limitation on the Commission's authority would apply both to adjudications under section 5 of the FTC Act and to rulemakings under section 18. This new section 24 is not intended to limit in any way the Commission's authority over "unfair methods of competition".

Where the Commission seeks to challenge unfair or deceptive acts or practices by professionals using its adjudicative authority under section 5 of the FTC Act, the Committee intends section 24 to operate to prohibit the Commission from entering an order having the effect of invalidating a State law or any particular part of a State law protected from invalidation under section 24. The Committee intends that the limitation contained in section 24 shall not apply if the following three conditions are present: (1) a State law contains a nonseverabil-

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[12] 317 U.S. 341 (1943)).

[13] *See, e.g., Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Bates* v. *State Bar of Arizona* 433 U.S. 350 (1977); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

ity clause; (2) but for this nonseverability clause, part of the State law may be invalidated consistently with section 24 (and other applicable law) and part may not; and (3) an invalidation otherwise prohibited by section 24 would result solely from the application of the nonseverability clause.

Where the Commission seeks to challenge unfair or deceptive acts or practices by professionals using its rulemaking authority under section 18 of the FTC Act, the Committee intends section 24 to operate to require the Commission to exempt from application of any such rule a State law or any particular part of a State law protected from invalidation under section 24.

The protection from invalidation contained in section 24 for State "training, education, or experience requirements for the licensure of professionals" is unqualified. By contrast, the Committee intends that State laws or parts of laws establishing "permissible tasks or duties that professionals may perform" shall be protected from invalidation only where such provisions are "based on specialized training or education." For example, section 24 would not prohibit the Commission from invalidating a State law prohibiting truthful advertising by members of a profession, because this provision would not be based upon the specialized training or education received by members of the affected professional group, as intended by this section. Where a State law or part of a law establishing "permissible tasks or duties" affects the members of more than one professional group, the provision must be based upon the specialized training or education received by members of all affected groups in order to be protected under section 24. State laws or parts of laws establishing "permissible tasks or duties" would include provisions of State law authorizing, directing, restricting, or prohibiting the tasks or duties professionals perform in the practice of their professions.

The protections of section 24 extend only to "State laws" relating to "professionals." As provided in section 24, the term "State law" means a statute of a State and a rule or regulation "duly promulgated" by a State agency. To be "duly promulgated" and fall within the protections of section 24, rules and regulations issued by a State agency must be authorized by applicable State law and developed in accordance with applicable State procedural requirements.

The term "professional" means any person who: (1) in the performance of his occupation, is subject to licensure or certification under State law; and (2) as a prerequisite for such licensure or certification under State law, has received a degree from an accredited institution of higher learning, or successfully completed a course of specialized training at an accredited education or training facility for health professions personnel operated as an integral part of a hospital.

The Committee intends that, notwithstanding section 24, the Commission may initiate and pursue an investigation to determine whether it has jurisdiction over a matter. The Committee expects, however, that the Commission shall proceed with caution and within the bounds of its authority in conducting any investigation of professionals or professional associations.

Finally, the Committee observes that many professionals and professional groups have expressed concern that Commission law en-

forcement may discourage them from engaging in valuable self-regulatory programs designed to protect and serve the public. The Committee recognizes that professional associations play an essential role in such useful self-regulatory activities as: board certification of professionals' competence and qualifications; accreditation of professional schools and training programs; and accreditation of institutions that deliver professional services, such as hospitals. These programs promote high standards of quality and provide valuable information that can improve the functioning of markets for professional services. Another example of beneficial self-regulation is peer review of the quality, cost, and necessity of services rendered by individual practitioners.

The Committee believes that such voluntary self-regulation serves important public goals and should be encouraged. Property structured and conducted activities by professionals are permissible under the antitrust and consumer protection laws. Official Commission statements acknowledge the legitimacy of professional self-regulation.[14] The Committee believes, however, that the Commission must strengthen its efforts to explain its enforcement policies to professionals and their associations, to ensure that responsible self-regulatory activities are not discouraged due to misunderstandings concerning the scope of Commision law enforcement.

Section 3.—Agricultural cooperatives

This section would add a new section 25 to the FTC Act, making permanent section 20 of the FTC Improvements Act of 1980, which prohibited the Commission temporarily from any study or investigation of agricultural marketing orders, or any study, investigation or prosecution of agricultural cooperatives for conduct which the Capper-Volstead Act exempts from the antitrust laws.

In addition, this section would create a new procedure permitting the Commission to issue antitrust complaints against agricultural cooperatives only if—

(1) the Commission gives 15-days' notice to and consults with the Secretary of Agriculture on the applicability of the Capper-Volstead Act to the conduct to be challenged;

(2) the Commission considers any comments actually submitted by the Secretary of Agriculture; and

(3) the Commission has reason to believe that the conduct in question is not exempt under the Capper-Volstead Act.

Furthermore, this procedure would give the Secretary of Agriculture, after the issuance of a Commission antitrust complaint against an agricultural cooperative, an opportunity to submit a written statement on the applicability of the Capper-Volstead Act, which must be included in the record of the proceedings.

The Committee intends that this procedure give the Secretary of Agriculture an advisory role. The Secretary would not have authority to veto or unilaterally to delay Commission law enforcement decisions

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[14] *See, e.g.*, FTC Advisory Opinion on Proposed Peer Review Program of Iowa Dental Association (Letter to Peter M. Sfikas, April 8, 1982); FTC Advisory Opinion on Proposed Peer Review Program of Rhode Island Professional Standards Review Organization (Letter to Edward J. Lynch, May 9, 1983); FTC Advisory Opinion on Proposed Code of Ethics of American Academy of Ophthalmology (Letter to Jerald A. Jacobs, June 17, 1983). See also FTC Bureau of Competition Advisory Opinion on Proposed Peer Review Program of American Podiatry Association (Letter to Norman Klombers, August 18, 1983).

involving agricultural cooperatives, nor would the Secretary's role be deemed to be formal intervention. Officials and employees of the Department of Agriculture would be subject to the same requirements and penalties regarding confidentiality of documents and information provided by the Commission and disclosure of the existence of an investigation or consideration of the issuance of a complaint as apply to officials and employees of the Commission.

The procedure is intended to give the Secretary of Agriculture an opportunity to present views and comments on the applicability of the Capper-Volstead Act. There is no requirement that the Secretary actually comment in any particular instance. If the Secretary does not comment within the 15-day period, the Commission would be able to issue the complaint, provided all other statutory requirements were met. Even if the Secretary of Agriculture concluded and advised the Commission that particular conduct is exempt, the Commission would still have the authority to issue an antitrust complaint against an agricultural cooperative.

While requiring an initial notification of the Secretary of Agriculture at least 15 days prior to the Commission's issuing an antitrust complaint against a Capper-Volstead agricultural cooperative, this section would not require a resubmission and retriggering of the 15-day period if the Commission made relatively minor changes or dropped some proposed allegations. However, resubmission would be required in the event the Commission expanded the allegations substantially.

The requirement concerning consultation is intended to require that the Commission or designated staff offer to meet with the Secretary of Agriculture or designated staff to discuss facts and allegations so as to enable the Secretary to provide comments in a timely manner on the applicability of the Capper-Volstead Act. This consultation requirement is not intended to be overly rigid or formal, however.

This section makes clear that Commission decisions made in accordance with the newly established procedure would not be deemed to constitute prejudgment by the FTC. In addition, the Committee emphasizes its intention that the procedure not create any new basis for direct or collateral challenge to Commission actions.[15]

The Committee believes this new procedure would not conflict with the Commission's responsibilities under the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, nor would it significantly delay other appropriate Commission law enforcement activity regarding agricultural cooperatives.

Subsection (c) of the new section 25 would apply only to antitrust complaints issued against Capper-Volstead agricultural cooperatives after the date of enactment; and it would not apply to nonantitrust compliants or to antitrust complaints issued before the date of enactment.

Section 4.—Compensation in proceedings

This section would repeal section 18(h) of the FTC Act, the Commission's authority to provide compensation for reasonable attorneys

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[15] *See FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980); *Dairymen, Inc.* v. *FTC*, 684 F.2d 376 (6th Cir. 1982), *cert. denied*, — U.S. — (1983).

fees, expert witness fees, and other costs to participants in section 18 trade regulation rulemakings. No funds have been appropriated for this program since fiscal year 1980.

Section 5.—Knowing violations of cease-and-desist orders

The purpose of this section is to clarify the scope of the Commission's existing authority under section 5(m)(1)(B) of the FTC Act to obtain civil penalties against persons who violate the holdings of prior cases. Section 5(m)(1)(B) provides that the Commission may obtain a civil penalty against a person who violates the holding of a prior case—even though that person was not a party—if the Commission can prove that the violator had actual knowledge that the practice was unfair or deceptive and unlawful.

Subsection (a) of this section would amend section 5(m)(1)(B) to make clear that such non-respondent liability may not be imposed where such person has violated the standards of an outstanding consent agreement. The Committee intends that a case settled by consent agreement would not qualify as a predicate for a section 5(m)(1)(B) proceeding, because the legal and factual issues in question would not have been subject to challenge in a adjudicatory proceeding. By contrast, the Commission issues a final cease-and-desist order only after all factual and legal issues have been fully adjudicated before an administrative law judge, subject to review by the Commission. Thus, it is the Commission's current practice not to seek penalties based upon nonrespondent violations of outstanding consent agreements, and this section codifies this practice. The Committee intends, however, that where a consent order is entered during court review of a litigated Commission cease-and-desist order, the Commission's holding and order may be used as a predicate for a section 5(m)(1)(B) proceeding.

Subsection (b) would amend section 5(m)(1)(B) to make clear that where the Commission seeks a civil penalty based on a violation of a holding in a case to which the defendant was not a party, the defendant may challenge in the penalty suit the validity of the Commission's legal determination of what constitutes an unfair or deceptive practice under section 5(a)(1). The court would examine the Commission's interpretation under the appropriate standard of review.[16] The Commission has already conceded in litigation under section 5(m)(1)(B), and one court has so held, that defendants in sections 5(m)(1)(B) cases must be given this right.[17] Because subsection (b) is intended to codify the Commission's current policy, as developed in the *Braswell* litigation, the Committee intends that subsection (b) apply to cases currently in litigation as well as cases initiated under 5(m)(1)(B) following enactment of this legislation.

Section 6.—Prevalence of unlawful acts and practices

This section would amend section 18(b) of the FTC Act to reemphasize the importance of prevalence as a basis for initiating a trade regulation rulemaking. Although the Commission has generally exercised appropriate discretion in initiating rulemaking proceedings, the

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[16] *See, e.g., FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

[17] *United States* v. *Braswell, Inc.*, 1981–82 Trade Cas. ¶ 64,325 (N.D. Ga. 1981), *aff'd*, No. 81–9666 (11th Cir., March 3, 1982).

Committee believes a statutory standard to guide the exercise of this discretion is desirable.

The section provides that the Commission may issue a notice of proposed rulemaking only if it has "reason to believe" that unfair or deceptive acts or practices are "prevalent." Prevalence exists only if the Commission has issued cease and desist orders regarding acts and practices that are addressed by the rule, or if other information available to the Commission indicates a "pattern" of unlawful conduct. The "reason to believe" standard is intended to bar any judicial review.

The Commission should not initiate a trade regulation rulemaking where only isolated and insignificant violations have occurred. Rulemaking is permissible only where there have been several cease-and-desist-orders or other evidence of a pattern of unlawful conduct. The Commission may, of course, consider the extent to which unlawful conduct causes significant economic injury in deciding whether to commence a rulemaking proceeding. It is the combined impact of the injury and the violations found which should be considered.

Where unlawful acts or practices are not "prevalent" within the meaning of this section, the Commission may proceed using its section 5 adjudicative authority, even if the Commission is thereby creating new law. The U.S. Court of Appeals for the Ninth Circuit was plainly incorrect to suggest recently that the Commission "exceed(s) its authority by proceeding to create new law by adjudication rather than rulemaking" and acts improperly by rendering a novel interpretation of law in an adjudication where the "rule of the case . . . will have general application." [18] Because this suggestion is inconsistent with congressional intent in conferring adjudicative authority upon the Commission, the Committee does not believe it poses any barrier to the Commission's use of adjudication to address novel legal questions nor any barrier to effective application of this section.

Section 7.—Effective date of cease-and-desist orders

This section would amend section 5(g) of the FTC Act to make most Commission cease-and-desist orders effective 60 days after service unless stayed by the Commission or a court.

Currently, Commission cease-and-desist orders become final within 60 days only if no petition for review has been filed. Otherwise, the effective date of the entire order must await the decision of the Court of Appeals or the Supreme Court as the case may be. Under present law, unless the Court of Appeals grants extraordinary ancillary relief, a respondent may continue to engage in conduct which the Commission has determined unlawful until the ultimate disposition of a petition for review, which often takes years.[19] Thus, in some cases, respondents are encouraged to file petitions for review, based on frivolous or other unmeritorious claims, largely for the purpose or effect of delay. This section would reduce the incentive to file petitions for review simply for dilatory purposes.

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[18] *Ford Motor Co.* v. *FTC*, 673 F.2d 1008 at 1011 (9th Cir.), *cert. denied sub nom. FTC* v. *Francis Ford, Inc.*, 74 L. Ed. 2d 394 (1982). See generally K. Davis, *Administrative Law Treatise*, 1982 Supplement, section 7.25 at 182–83 and cases cited.

[19] Chairman Miller testified that: "Of all cases finally decided by a court of appeals during the four-year period from January 1, 1977, over two-thirds of the Commission's orders were substantially affirmed. Yet the delay in the effectiveness of these affirmed orders ranged from 18 to 48 months and averaged approximately 29 months." Prepared Statement of James C. Miller III, March 18, 1982, at 6.

Moreover, as many challenges to Commission decisions relate only to certain provisions of a cease-and-desist order, there is no compelling reason to delay the effective date of the order in its entirety in each case, as at present.

The Committee believes that the proposed amendment offers sufficient protection to those parties with legitimate reasons for noncompliance by permitting them to obtain a stay of the order from the Commission in the first instance, the U.S. Court of Appeals before which a petition to review is pending, or the Supreme Court if a petition for certiorari has been filed. To insure against delay in action upon applications for a stay, this section would permit the Court of Appeals to consider a stay request if the Commission had not acted within 30 days of the receipt of such an application.

The procedure contemplated by this section is the norm for other federal agencies and also reflects the practice in the federal court system. Similar provisions are found in the statutes of the Civil Aeronautics Board, the Environmental Protection Agency, the Federal Communications Commission, and the Federal Energy Administration to name a few.[20]

Because of the substantial impact on business operations of a divestiture order, this section would retain the current mandatory stay requirements as to such orders. This section also retains the current definition of finality with respect to the initiation of consumer redress actions and actions arising from knowing violations of the holding of Commission decisions by non-parties.

Section 8.—Civil investigative demands

This section would amend section 20 of the FTC Act to require that all Commission law enforcement investigations be conducted pursuant to civil investigative demand ("CID") procedures set out in that section. Under current law, the CID procedures are limited to the Commission's consumer protection investigations. Because these procedures have worked well at the Commission, and because the Department of Justice has successfully used CID's in its antitrust investigations, the Committee believes that the CID procedures should apply to the Commission's antitrust investigations as well. The Committee intends no change in the scope or usage of CID's as discussed in the report of the provision enacted as section 20.[21]

Section 9.—Definition of unfair acts or practices

This section would amend section 5 of the FTC Act to add a new subsection limiting the Commission's authority over "unfair acts or practices" to acts or practices that cause or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition. This limitation would apply both to adjudications under section 5 and rulemakings under section 18.

In accordance with the Commission's recommendation, this section is intended to codify, as a statutory limitation on unfair acts or prac-

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[20] See, e.g., 49 U.S.C. § 1485(a) (CAB); 7 U.S.C. § 135b(d), 42 U.S.C. § 4915(c) (EPA); 47 U.S.C. § 402 (FCC); 29 U.S.C. § 160(g) (NLRB) and 15 U.S.C. § 77l(b) (SEC).

[21] See Senate Rep. No. 96–500, 96th Cong., 1st sess., 23–26 (1979). The Commission would continue to use subpena authority under section 9 of the FTC Act in adjudicatory proceedings and in investigations to determine whether an outstanding order to cease and desist has been violated.

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tices, the principles of the Commission's December 17, 1980 policy statement on unfairness. Since the Commission's policy statement itself is based on the Commission's decided cases and rules, this section codifies existing law. The incorporation of these criteria should enable the Commission to proceed in its development of the law of unfairness with a firm grounding in the precedents decided under this authority, and consistently with the approach the Commission and the courts have taken in the past. The Committee believes this codification is necessary in order to provide the Commission, its staff, regulated business, and reviewing courts greater guidance on the meaning of unfairness and to prevent a future Commission from abandoning the principles of the December 17, 1980 letter.

Consumer injury may be "substantial" under this section if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers. In accordance with the Commission's December 17, 1980 letter, substantial injury is not intended to encompass merely trivial or speculative harm. In most cases, substantial injury would involve monetary or economic harm or unwarranted health and safety risks. Emotional impact and more subjective types of harm alone are not intended to make an injury unfair.

In determining whether a substantial consumer injury is outweighed by the countervailing benefits of a practice, the Committee does not intend that the Commission quantify the detrimental and beneficial effects of the practice in every case. In many instances such a numerical benefit-cost analysis would be unnecessary; in other cases, it may be impossible. This section would require, however, that the Commission carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence.

The Committee knows that State Attorneys General have expressed a concern that the limitation on unfairness in this section may be construed to affect provisions in State statutes or State case law.

Since the mid-1960's, virtually every State has enacted statutes prohibiting deceptive practices, while at least 30 States also prohibit unfair practices. These State consumer protection acts are enforced almost exclusively through recourse to State courts. Many of the statutes direct courts to be guided by interpretations of the FTC Act. In other States, the courts have interpreted these laws consistently with developments under Federal law. State courts have applied the unfairness standard in a variety of contexts including unconscionable pricing practices, high pressure sales tactics, unhabitable living conditions in leased premises, and abusive debt collection practices.

The Committee intends no effect whatever on those or other developments under State law. This section represents a consensus view of an appropriate codification of Federal standards, undertaken after careful assessment of the Commission's past activities. The Committee's action should not be understood as suggesting that the criteria in this section are necessarily suitable in the further development of State unfairness law or that the Commission's future construction of these criteria delimits in any way the range of State decisionmaking. Sound principles of federalism limit the impact of this section to the Commission only.

Section 10.—Trademarks

This section would prohibit the Commission from taking any action under section 14 of the Lanham Act (15 U.S.C. 1064) with respect to the cancellation of the registration of any trademark on the ground that such mark has become the common descriptive name of an article or substance. This section would make permanent the limitation on Commission trademark litigation contained in section 18 of the FTC Improvements Act of 1980. This section does not affect any authority that the Commission may have under other statutes to bring an action challenging the validity of a trademark nor its authority under the Lanham Act to seek to have a mark cancelled on grounds other than the ground it has become "the common descriptive name of an article or substance".

Section 11.—Credit unions

This section would amend portions of sections 5, 6, and 18 of the FTC Act to exempt Federal credit unions from Commission jurisdiction in the same manner that banks and savings and loan institutions are presently exempted.

When the Commission was created in 1914, banks were specifically exempted from the regulatory and investigative authorities of the newly created Commission, because, as depository institutions, they were subject to close Federal regulatory control by the Federal Reserve Board. Savings and loan institutions under the authority of the Federal Home Loan Bank Board were granted a parallel exemption in 1979, by enactment of Public Law 96–37.

Under the terms of the exemptions provided to banks and savings and loans, these institutions are excluded from the Commission's enforcement and investigative authority under sections 5 and 6 of the FTC Act, but section 18(f) provides that whenever the Commission promulgates a trade regulation rule under section 18, the Federal Reserve Board and the Federal Home Loan Bank Board must promulgate a substantially similar rule respecting banks and savings and loans unless these agencies determine that the challenged acts or practices are not unfair or deceptive in the context of those institutions.

Federal credit unions are extensively regulated pursuant to the Federal Credit Union Act (12 U.S.C. 1751–1795) by the National Credit Union Administration (NCUA), an independent Federal agency with primary responsibility for the chartering, supervision, regulation and examination of credit unions chartered by the Federal Government. The regulatory presence with respect to Federal credit unions clearly parallels the presence with respect to banks and savings and loan institutions, and the Committee believes that there is no reason to treat Federal credit unions differently.

Although the Commission has never brought an enforcement action against a credit union for violations of the FTC Act, it does have a number of pending rules that would directly affect credit union lending practices. Thus, this section would end the potential for the unnecessary, costly and duplicative Government regulation that follows from having both the Commission and the NCUA regulate Fed-

eral credit unions by providing the same exemption from Commission jurisdiction now provided to banks and savings and loans.

The Committee intends that NCUA be authorized to use its full authority under the Federal Credit Union Act to remedy suspected antitrust and consumer protection violations by Federal credit unions. Section 120 of the Federal Credit Union Act (12 U.S.C. 1766) provides NCUA general rulemaking power, including the power through rulemaking to govern mergers among Federal credit unions. Section 206 (12 U.S.C. 1786) provides NCUA the power to issue cease and desist orders where, inter alia, a credit union is engaged in an "unsafe or unsound practice" or is violating or is about to violate a "law, rule, or regulation."

NCUA would have ample authority under section 120 and under the amendments made by this section to promulgate rules respecting unfair or deceptive acts or practices pursuant to section 18(f) of the FTC Act. As the amendments made by this section make clear, the penalty provisions of sections 120 and 206 of the Federal Credit Union Act would apply fully to violations of such rules. In addition, the Committee believes that NCUA would also have the authority under section 120 to order credit unions to cease from otherwise violating the FTC Act or any other antitrust or consumer protection "law, rule or regulation." [22]

In writing in support of the section, NCUA Chairman E. F. Callahan confirmed that:

> The National Credit Union Administration is prepared to ensure proper compliance in such matters, and we concur that our authority under Section 120 . . . and Section 206 . . . is sufficient to protect the interests of Federal credit union members.[23]

In addition, the Committee notes that the U.S. Department of Justice would retain antitrust authority over credit unions, just as it has over banks and savings and loans.

Section 12.—Commercial advertising

This section would amend section 18 of the FTC Act to provide that the Commission shall have no authority under that section to initiate any new rulemaking proceedings which is intended to or may result in the promulgation of any rule by the Commission which prohibits or otherwise regulates any commercial advertising on the basis of a determination by the Commission that such commercial advertising constitutes an unfair act or practice in or affecting commerce.

Under this section, the Commission would continue to have the authority to rely on unfairness to prohibit or regulate commercial advertising in individual case adjudications under section 5 of the FTC Act. The Commission would also continue to have the authority to prohibit or regulate commercial advertising based upon a decep-

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[22] *Cf. Reich* v. *Webb*, 336 F.2d 153 (9th Cir. 1964), *cert. denied*, 380 U.S. 915 (1965); *Otero Savings and Loan Assoc.* v. *Federal Home Loan Bank Board*, 665 F.2d 279 (10th Cir. 1981).

[23] Record of the Hearings before the Senate Commerce Committee on the Reauthorization of the Federal Trade Commission, March 16, 17, 18, 1983 (Serial No. 98–19), page 367.

tion theory, through both section 5 case adjudications and section 18 rulemakings. This section would thus make permanent the similar limitation on new section 18 rulemakings enacted on a temporary basis in section 11 of the FTC Improvement Act of 1980.

For purposes of this section, the term "commercial advertising" denotes promotional messages that appear in broadcast or print media, including promotional mailings. It is not intended to cover oral representations, representations in credit contracts, debt collection notices, and the like, which would remain subject to the Commission's unfairness jurisdiction.[24]

Further, this section is intended to apply to regulation by the Commission of the content of commercial advertising, and not to regulation of practices that may somehow pertain to such advertising but are not themselves advertising. For example, this section would not affect the Commission's authority to regulate practices that ban or restrain commercial advertising, or to regulate "practices" that are unfair, e.g., placing sample razor blades in a newspaper insert.

The Committee believes that the limitation contained in this section is warranted because the constitutional protection accorded to nondeceptive commercial speech is threatened by the broad grant of "unfairness" jurisdiction contained in section 18 of the FTC Act. The fact that "purely" commercial speech is within the protection of the First Amendment is no longer subject to doubt.[25] In recent Supreme Court decisions defining the limits of governmental power to regulate commercial speech, the Court has made it clear that government retains the power to proscribe misleading or deceptive advertising.

The "unfairness" standard in section 18 has no proper place in the regulation of commercial speech as the standard is too vague to avoid an unacceptable risk of abridging First Amendment principles of free speech, and does not take into account the mandate that the least restrictive form of regulation must be used consistent with meeting the substantial governmental interest involved.[26] The Committee is particularly concerned that the use of unfairness authority when applied on an industry-wide basis in rulemaking proceedings is too broad. By contrast, when the Commission proceeds using its section 5 adjudicative authority, the Commission's remedial order may be better tailored to the facts of the specific case before the Commission. Moreover, the Commission's use of the unfairness standard has survived litigation in cases dealing with unfair methods of competition or unfair acts or practices, not advertising.[27] Because the unfairness standard in section 18 goes beyond the elimination of misleading or deceptive commercial speech, it raises an unacceptable potential for conflict with First Amendment principles.

Moreover, the Committee is persuaded that the FTC's existing authority to prohibit unfair or deceptive acts or practices under section 5 and deceptive practices under section 18 is sufficient to permit the

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[24] See, e.g., *Horizon Corp.* (Dkt. No. 9017, May 15, 1981); *Spiegel, Inc.* v. *FTC*, 540 F.2d 287 (7th Cir. 1976); *General Motors Corp.*, 95 F.T.C. 825 (1980).

[25] *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976).

[26] *Central Hudson Gas & Electric Corporation* v. *Public Service Commission of New York*, 447 U.S. 557 (1980).

[27] See, e.g., *FTC* v. *R. F. Keppel & Bros.*, 291 U.S. 304 (1934); *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

Commission to police abusive advertising practices. The Committee believes that illegal advertising practices prohibited by the Commission in the past could be reached by this authority. Consequently, the Committee believes this amendment does not in any way undercut appropriate Commission law enforcement but only protects against unwarranted and constitutionally sensitive actions against commercial advertising in the future.

While it appears that the Commission has, in the past, attacked certain abusive advertising practices as "unfair," it has also attacked these same practices as "deceptive," and this section should, therefore, not result in legalization of such practices in the future. One example is the Commission's advertising substantiation program. Unsubstantiated advertising was originally addressed as an "unfair" practice, see *Pfizer, Inc.*, 81 F.T.C. 23 (1972), but subsequent Commission decisions have firmly established that dissemination of unsubstantiated advertisements is a deceptive practice, as well.[28] It should be noted that in advocating enactment of related legislation in testimony before the Committee, representatives of the major advertising trade associations said that they did not intend "to affect in any way the FTC's power to require that positive claims made in advertisements must be substantiated." This section is not intended to impair in any way the Commission's advertising substantiation program.[29]

A second example relates to commercial advertising depicting unsafe or unlawful activity.[30] While such cases have been addressed in the past as both "unfair" and, "deceptive" practices, representatives of the advertising industry testified that they "could clearly be brought under a deception theory." The Committee believes that to the extent such advertisements are deceptive because they fail to reveal material facts, the advertisements may be deceptive.

Section 13.—Report

This section requires the Commission to submit a detailed report, twice a year, on its enforcement of the law against resale price maintenance.

Since 1911, resale price maintenance—the fixing of retail prices by manufacturers—has been deemed by the courts to be a per se violation of the antitrust laws. Congress affirmed this view when it repealed authorization for state Fair Trade laws in 1975, and expressed its intent to reapply the per se rule across the country.

Notwithstanding this clear history of the law, some members of the Commission have expressed their disapproval of the per se rule. As the

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[28] Eg., *National Comm'm on Egg Nutrition*, 88 FTC 89, 191 (1976), aff'd, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978); *Sears, Roebuck & Co.*, 95 FTC 406, 520–21 (1980), aff'd, 676 F.2d 385 (9th Cir. 1982).

[29] In approving the ad substantiation program the Committee intends to incorporate the general scope of this program as it has been endorsed by the Commission and the courts. We recognize that its application will require further elaboration by the Commission and the courts. The Committee has not reviewed, and takes no position on the FTC staff position in various FTC ad substantiation cases which are currently pending.

[30] See, e.g., *Uncle Ben's Inc.*, 89 FTC 131 (1977) (ad portrayed children cooking at a stove); *Mego Industries, Inc.*, 92 FTC 186 (1978) (ad portrayed child using electric appliance near sink of water); *General Foods Corp.*, 86 FTC 831 (1975) (ad portrayed Euell Gibbons eating wild plants in ad for Grape-Nut cereal); *AMF, Inc.*, 95 FTC 310 (1980) (ad showed children riding bicycles in unsafe manner). The cases were consent settlements and were never litigated. Cases in which advertisements depict usage of a product in an unsafe or inappropriate manner have occurred infrequently in the past, and this is an area in which the Committee hopes that there will be continued cooperation between the Commission and industry.

Committee learned in the course of its hearings, this view has been reflected in a reduction in the Commission's law enforcement activity in this area.

The Committee is concerned about the lack of law enforcement in this area. The current prohibition of resale price maintenance is intended to protect both consumers—who seek low retail prices—and retailers, who seek the right to compete. In exercise of its oversight powers, the Committee consequently has mandated that the Commission forward detailed information about its activities in this area. Such information may serve as a basis for other appropriate legislative action.

Section 14.—Authorization of appropriations

This section would provide for a 3-year reauthorization for the Commission at funding levels of $69,900,000 for fiscal year 1984; $71,100,000 for fiscal year 1985; and $72,400,000 for fiscal year 1986.

Section 15.—Effective date

This section would provide that, unless otherwise provided, provisions of this legislation become effective on the date of enactment.

Rollcall Votes in Committee

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 1714:

Senator Kasten offered an amendment to S. 1714 that would have added a new section to the bill prohibiting the Commission from initiating any new adjudication or any new rulemaking regulating commercial advertising on the basis of "unfairness". Senator Gorton offered an amendment to the Kasten amendment limiting this prohibition to new rulemaking proceedings. On a rollcall vote of 8 yeas and 7 nays as follows, the Gorton amendment was adopted:

YEAS—8	NAYS—7
Mr. Packwood	Mr. Stevens
Mr. Goldwater [1]	Mr. Hollings [1]
Mr. Danforth	Mr. Long
Mrs. Kassebaum	Mr. Ford
Mr. Gorton	Mr. Riegle [1]
Mr. Kasten	Mr. Exon [1]
Mr. Trible	Mr. Heflin [1]
Mr. Lautenberg	

[1] By proxy.

Senator Kasten offered an amendment to S. 1714 that would have added a new section to the bill providing for a maximum of $1 million on the total civil penalty the Commission could seek in Federal court for a related series of violations of a Commission consumer protection

order or rule. On a rollcall vote of 7 yeas and 7 nays as follows, the Kasten amendment was defeated:

YEAS—7	NAYS—7
Mr. Goldwater [1]	Mr. Packwood
Mrs. Kassebaum [1]	Mr. Danforth
Mr. Pressler [1]	Mr. Gorton
Mr. Stevens	Mr. Ford
Mr. Kasten	Mr. Riegle [1]
Mr. Trible	Mr. Exon [1]
Mr. Heflin	Mr. Lautenberg

[1] By proxy.

Senator Kasten offered an amendment to section 3 of S. 1714 adding to the requirements already contained in that section a prohibition of Commission studies or investigations of marketing orders and a requirement that the Commission consult with the Secretary of Agriculture before suing an agricultural cooperative. The Kasten amendment was adopted without objection.

Senator Lautenberg offered an amendment to S. 1714 that would have added a new section to the bill requiring the Commission to report semiannually on its enforcement activities in the area of resale price maintenance. The Lautenberg amendment was adopted without objection, with a modification suggested by Senator Stevens permitting the Commission to combine one such report a year with the Commission's Annual Report.

On a rollcall vote of 16 yeas and no nays as follows, the Committee ordered S. 1714 favorably reported:

YEAS—16	NAYS—0
Mr. Packwood	
Mr. Goldwater [1]	
Mr. Danforth	
Mrs. Kassebaum	
Mr. Pressler [1]	
Mr. Gorton	
Mr. Stevens	
Mr. Kasten	
Mr. Trible	
Mr. Hollings [1]	
Mr. Long	
Mr. Ford	
Mr. Riegle [1]	
Mr. Exon [1]	
Mr. Heflin [1]	
Mr. Lautenberg	

[1] By proxy.

Without objection, the Committee authorized the staff to make any necessary technical or conforming amendments to the bill.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

THE FEDERAL TRADE COMMISSION ACT

(15 U.S.C. 41 et seq.)

SECTION 5 OF THAT ACT

SEC. 5. (a)(1) * * *

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3), *Federal credit unions described in section 18(f)(4)*, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) * * *

(b)-(f) * * *

(g) An order of the Commission to cease and desist shall become final—

(1) * * *

[(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or]

(2) Upon the 60th day after such order is served, if a petition for review has been duly filed, except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by—

(A) the Commission:

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending; or

[(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or]

(3) For purposes of section 19(a)(2) and section 5(m)(1)(B), if a petition for review of the orders of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed; or

[(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.]

(4) In the case of an order requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h)–(l) * * *

(m)(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, *other than a consent order*, with respect

to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with section 5(a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. *Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a).*

(3) * * *

(n) The Commission shall not have any authority to find a method of competition to be an unfair method of competition under subsection (a)(1) if, in any action under the Sherman Act, such method of competition would be held to constitute State action.

(o) The Commission shall have no authority under this section or section 18 to declare unlawful an act or practice on the grounds that such an act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

SECTION 6 OF THAT ACT

SEC. 6. The commission shall also have power—

(a) INVESTIGATION OF CORPORATIONS AND OTHERS. To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 18(f)(3), *Federal credit unions described in section 18(f)(4)*, and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

(b) REPORTS BY CORPORATIONS AND OTHERS. To require, by general or special orders, persons, partnerships, and corporations engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 18(f)(3), *Federal credit unions described in section 18(f)(4)*, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports, or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c)–(h) * * *

Provided, That the exception of "banks, savings and loan institutions described in section 18(f)(3), *Federal credit unions described in section 18(f)(4)*, and common carriers subject to the Act to regulate commerce" from the Commission's powers defined in clauses (a) and (b) of this section, shall not be construed to limit the Commission's authority to gather and compile information, to investigate, or to require reports or answers from, any person, partnership, or corporation to the extent that such action is necessary to the investigation of any person, partnership, or corporation, group of persons, partnerships, or corporations, or industry which is not engaged or is engaged only incidentally in banking, business as a savings and loan institution, *in business as a Federal credit union*, or in business as a common carrier subject to the Act to regulate commerce.

* * * * * * *

SECTION 18 OF THAT ACT

SEC. 18. (a)(1) Except as provided in [subsection (i)] *subsection (h)*, the Commission may prescribe—

(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)) of this Act, and

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5(a)(1)), except that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

(2) * * *

(b)(1)–(2) * * *

(3) The Commission shall issue a notice of proposed rulemaking pursuant to paragraph (1)(A) only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent. The Commission shall make a determination that unfair or deceptive acts or practices are prevalent under this paragraph only if it has issued cease-and-desist orders regarding such acts or practices, or any other information available to the Commission indicates a pattern of unfair or deceptive acts or practices.

(c)–(e) * * *

(f)(1) In order to prevent unfair or deceptive acts or practices in or affecting commerce (including acts or practices which are unfair or deceptive to consumers) by banks, or savings and loan institutions described in paragraph (3) each agency specified in paragraph (2) or (3) of this subsection shall establish a separate division of consumer affairs which shall receive and take appropriate action upon complaints with respect to such acts or practices by banks or savings and loan institutions described in paragraph (3) subject to its jurisdiction. The Board of Governors of the Federal Reserve System (with respect to banks) and the Federal Home Loan bank board (with respect to savings and loan institutions described in paragraph (3)) *and the National Credit Union Administration Board (with respect to Federal credit unions described in paragraph (4)* shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices. Whenever the Commission prescribes a rule under subsection (a)(1)(B) of this section, then within 60 days after such rule take effect each such Board shall promulgate substantially similar regulations prohibiting acts or practices of banks or savings and loan institutions described in paragraph (3), *or Federal credit unions described in paragraph (4)*, as the case may be, which are substantially similar to those prohibited by rules of the Commission and which impose substantially similar requirements, unless (A) [either such] *any such* Board finds that such acts or practices of banks or savings and loan institutions *described* in paragraph (3), *or Federal credit unions described in paragraph (4)* as the case may be are not unfair or deceptive, or (B) the Board of Governors of the Federal Reserve System finds that implementation of similar regulations with respect to banks, *savings and loan institutions or Federal credit unions* would seriously conflict with essential monetary and payment system policies of such Board, and publishes any such finding, and the reason therefor, in the Federal Register.

(2)–(3) * * *

(4) Compliance with regulations prescribed under this subsection shall be enforced with respect to Federal credit unions under sections 120 and 206 of the Federal Credit Union Act (12 U.S.C. 1766 and 1786).

[(4)](5) For the purpose of the exercise by any agency referred to in paragraph (2) of its powers under any Act referred to in that para-

graph, a violation of any regulation prescribed under this subsection shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in paragraph (2), each of the agencies referred to in that paragraph may exercise, for the purpose of enforcing compliance with any regulation prescribed under this subsection, any other authority conferred on it by law.

[(5)] *(6)* The authority of the Board of Governors of the Federal Reserve System to issue regulations under this subsection does not impair the authority of any other agency designated in this subsection to make rules respecting its own procedures in enforcing compliance with regulations prescribed under this subsection.

[(6)] *(7)* Each agency exercising authority under this subsection shall transmit to the Congress each year a detailed report on its activities under this paragraph during the preceding calendar year.

(g) * * *

[(h) *(1)* The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

[(2) The Commission shall reserve an amount equal to 25 percent of the amount appropriated for the payment of compensation under this subsection for any fiscal year for use in accordance with this paragraph. Such reserved amount shall be available solely for the payment of compensation to persons who either (A) would be regulated by the proposed rule involved; or (B) represent persons who would be so regulated. Any portion of such reserved amount which is not used for the payment of compensation to such persons under this paragraph shall revert to the Treasury of the United States.

[(3) The amount of compensation which may be paid to any person under this subsection in connection with the participation by such person in any particular rulemaking proceeding under this section may not exceed $75,000. The aggregate amount of compensation paid under this subsection in any fiscal year to any person for all rulemaking proceedings in which such person participates during such fiscal year may not exceed $50,000.

[(4) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed $750,000.

[(5) The Commission, in connection with the administration of this subsection pursuant to rules prescribed by the Commission under paragraph (1), shall establish a small business outreach program. Such program shall—

(A) solicit public comment from small businesses whose views otherwise would not be adequately represented, in order to ensure a fair determination in rulemaking proceedings under this section; and

(B) encourage the participation of small businesses in the compensation program administered by the Commission under this subsection by disseminating to small businesses information which explains the procedures and requirements applicable to the receipt of compensation under such program.]

[(i)](*h*) The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on the date of the enactment of the Federal Trade Commission Improvements Act of 1980 or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce. *The Commission shall have no authority under this section to initiate any new rulemaking proceeding which is intended to or may result in the promulgation of any rule by the Commission which prohibits or otherwise regulates any commercial advertising on the basis of a determination by the Commission that such commercial advertising constitutes an unfair act or practice in or affecting commerce.*

[(j)](*i*)(1) For purposes of this subsection, the term "outside party" means any person other than (A) a Commissioner; (B) an officer or employee of the Commission; or (C) any person who has entered into a contract or any other agreement or arrangement with the Commission to provide any goods or services (including consulting services) to the Commission.

(2) Not later than 60 days after the date of the enactment of the Federal Trade Commission Improvements Act of 1980, the Commission shall publish a proposed rule, and not later than 180 days after such date of enactment the Commission shall promulgate a final rule, which shall authorize the Commission or any Commissioner to meet with any outside party concerning any rulemaking proceeding of the Commission. Such rule shall provide that—

(A) notice of any such meeting shall be included in any weekly calendar prepared by the Commission; and

(B) a verbatim record or a summary of any such meeting, or of any communication relating to any such meeting, shall be kept, made available to the public, and included in the rulemaking record.

[(k)](*j*) Not later than 60 days after the date of the enactment of the Federal Trade Commission Improvements Act of 1980, the Commission shall publish a proposed rule, and not later than 180 days after such date of enactment the Commission shall promulgate a final rule, which shall prohibit any officer, employee, or agent of the Commission with any investigative responsibility or other responsibility relating to any rulemaking proceeding within any operating bureau of the Commission, from communicating or causing to be communicated to any Commissioner or to the personal staff of any Commissioner any fact which is relevant to the merits of such proceeding and which is not on the rulemaking record of such proceeding, unless such communciation is made available to the public and is included in the rulemaking record. The provisions of this subsection shall not apply to any communication to the extent such communication is required for the disposition of ex parte matters as authorized by law.

SECTION 20 OF THAT ACT

SEC. 20. (a) For purposes of this section:

(1) * * *

(2) The term "Commission investigation" means any inquiry conducted by a Commission investigator for the purpose of ascertaining whether any person is or has been engaged in any [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))] *act or practice or method of competition declared unlawful by a law administered by the Commission.*

(4)-(6) * * * *

(7) The term "violation" means any act or omission constituting an [unfair or deceptive act or practice in or affecting commerce (within the meaning of section 5(a)(1))] *act or practice or method of competition declared unlawful by a law administered by the Commission.*

(b) For the purpose of investigations performed pursuant to this section with respect to [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)] *any act or practice or method of competition declared unlawful by a law administered by the Commission*, all actions of the Commission taken under section 6 and section 9 shall be conducted pursuant to subsection (c).

(c)(1) Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))] *any act or practice or method of competition declared unlawful by a law administered by the Commission*, the Commission may, before the institution of any proceedings under this Act, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to file written reports or answers to questions, to give oral testimony concerning documentary material or other information, or to furnish any combination of such material, answers, or testimony.

(2)-(12) * * *

(d)-(j) * * *

SEC. 24. (a) For purposes of this section:

(1) The term "professional" means any person who—

(A) in the performance of his occupation, is subject to licensure or certification under State law; and

(B) as a prerequisite for such licensure or certification under State law, has (i) received a degree from an accredited institution of higher learning, or (ii) successfully completed a course of specialized training at an accredited education or training facility for health professions personnel operated as an integral part of a hospital.

(2) The term "State law" means a statute of a State and a rule or regulation duly promulgated by a State agency.

(b) The Commission shall not use its authority under section 5 or section 18 to prohibit unfair or deceptive acts or practices engaged

in by professionals in a particular State if such use of authority would result in the invalidation of a State law of such State or any part of such law if such law or part establishes—

(1) training, education, or experience requirements for the licensure of professionals; or

(2) permissible tasks or duties that professionals may perform based on specialized training or eduction.

SEC. 25. (a) For purposes of this section, the term "Capper-Volstead Act" means the Act entitled "An Act to authorize association of producers of agricultural products", approved February 18, 1922 (7 U.S.C. 291 et seq.).

(b) The Commission shall not have any authority to conduct any study, investigation, or prosecution of any agricultural cooperative for any conduct which, because of the provisions of the Capper-Volstead Act, is not a violation of any of the antitrust Acts or this Act.

(c) (1) Before issuing a complaint under section 5 against any agricultural cooperative on the basis that such cooperative has violated any of the antitrust Acts or has used an unfair method of competition in or affecting commerce, the Commission shall—

(A) provide the Secretary of Agriculture with a copy of the proposed complaint not less than 15 days before the complaint is issued; and

(B) consult with the Secretary of Agriculture regarding the possible applicability of the Capper-Volstead Act to the conduct of the cooperative.

(2) The Commission shall not issue any such complaint unless—

(A) it has considered any comments regarding such complaint which have been submitted by the Secretary of Agriculture under this subsection; and

(B) it has reason to believe that the Capper-Volstead Act does not provide an exemption for the conduct which is the basis of such complaint.

(3) If the Commission makes a modification to any such complaint after it has provided the Secretary of Agriculture with a copy of the complaint pursuant to paragraph (1) (A) of this subsection, the Commission shall not, with respect to such modification, be required to comply with the provisions of paragraphs (1) and (2) of this subsection unless such modification substantially expands the original basis for the issuance of the complaint.

(4) The Secretary of Agriculture shall designate those officials and employees of the Department of Agriculture who may have access to documents or information received from the Commission under this subsection. Officials and employees of the Department of Agriculture shall be subject to the same requirements and penalties regarding confidentiality of such documents and information and disclosure of the existence of an investigation or consideration of issuance of a complaint as apply to officials and employees of the Commission.

(5) Unless specifically authorized in writing by the Commission (or by any official or employee of the Commission designated by the Commission), no official or employee of the Department of Agriculture may request information relating to such complaint from any proposed respondent or any third party before the issuance of such complaint.

(6) After any such complaint is issued, the Secretary of Agriculture may file with the Commission a written statement regarding the applicability of the Capper-Volstead Act to the action or method which is the basis of such complaint. The Commission shall include such statement in the record of the proceeding regarding such complaint.

(7) No decision of the Commission to consult with the Secretary of Agriculture in accordance with the provisions of this subsection shall be construed to imply that the Commission has made a determination that it has reason to believe that any agricultural cooperative has violated or is violating any of the antitrust Acts or has used an unfair method of competition in or affecting commerce.

(8) The provisions of this subsection shall not create any new basis for direct or collateral challenge to any complaint issued by the Commission.

(d) The Commission shall not have any authority to conduct any study or investigation of any agricultural marketing orders.

SEC. 26. The Commission shall not have any authority to take any action under section 14 of the Act entitled 'An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes' (15 U.S.C. 1064), commonly referred to as the Lanham Act, with respect to the cancellation of the registration of any mark on the ground that such mark has become the common descriptive name of an article or substance.

SECTION 24 OF THAT ACT

SEC. [24] *27.* There are authorized to be appropriated to carry out the functions, powers, and duties of the Federal Trade Commission not to exceed $42,000,000 for the fiscal year ending June 30, 1975; not to exceed $47,091,000 for the fiscal year ending June 30, 1976; not to exceed $50,000,000 for the fiscal year ending in 1977; not to exceed $70 000,000 for the fiscal year ending September 30, 1980; not to exceed $75,000,000 for the fiscal year ending September 30, 1981; [and] not to exceed $80,000,000 for the fiscal year ending September 30, 1982*; not to exceed $69,900,000 for the fiscal year ending September 30, 1984; not to exceed $71,100,000 for the fiscal year ending September 30, 1985; and not to exceed $72,400,000 for the fiscal year ending September 30, 1986.*

SECTION 25 OF THAT ACT

SEC. [25] *28. This Act may be cited as the "Federal Trade Commission Act."*

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